**UNITED STATES OF AMERICA**

**BEFORE NATIONAL LABOR RELATIONS BOARD**

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| **NORTH AMERICAN CORPORATION,**<br>**EMPLOYER,**<br>**and**<br>**TEAMSTERS LOCAL 705,**<br>**PETITIONER,**<br>**and**<br>**PRODUCTION AND MAINTENANCE UNION, LOCAL 101,**<br>**INTERVENOR.** | **NLRB Case No. 13-RC-253792** |

# TEAMSTERS LOCAL 705'S BRIEF IN OPPOSITION TO EMPLOYER'S AND INTERVENOR'S REQUESTS FOR REVIEW

Teamsters Local Union No. 705 hereby submits its Brief in Opposition to the Employer's and Intervenor's requests for review pursuant to the National Labor Relations Board's Rules and Regulations § 102.67(f). The Union requests that the Regional Director's decision be upheld and the requests for review be denied. The Union reserves the right to supplement this Brief as necessary. The Union hereby states the following:

## I. INTRODUCTION

Teamsters Local 705 ("Union"), which is certified as the exclusive representative of a unit of approximately 40 drivers at North American Corp.'s ("Employer") facility in Glenview, Illinois, opposes the Petitioner's and Employer's request for review in this matter. Applying decades of settled Board precedent and policy, the Regional Director issued a Direction of Election after he found that a supplemental agreement did not serve as a contract bar and thus did not restrict the Employer's employees ability to exercise their right to leave their prior labor organization ("Local 101") and join the Union.

The Employer's and Local 101's requests for review seek to rob employees of their right to choose which labor organization, if any, they wish to belong to. The Employer and Local 101 attempted to assert the existence of a contract bar based on a supplement ("Supplement") to an existing collective bargaining agreement ("CBA"). The Regional Director correctly found that, based on long-established precedent, the parties asserting the contract bar had the burden of proving such bar existed and they failed to do so. The Supplement's lack of a clear date of execution and the parties' failure to ratify the Supplement, as mandated by the document itself, prohibit the Supplement from serving as a contract bar. Alternatively, the Regional Director erred by finding that the Supplement constituted more than a mere wage reopener.

The employee's overwhelming choice to decertify Local 101 as their exclusive collective bargaining representative should be honored. There are no compelling reasons for the Board to revisit decades of established precedent or otherwise to grant review in this case.

## II. STATEMENT OF FACTS

Local 101 represented a group of employees who work for the Employer. Local 101 and the Employer entered into a collective bargaining agreement ("CBA") with a term of October 5,

2015, through October 4, 2020 (Bd. 2). The CBA covered the customary terms and conditions of employment, including wages, hours, disciplinary guidelines, vacations, health care, seniority, security, and more.

Local 101 and the Employer signed a supplemental agreement on November 6 and November 7, 2017, respectively (Bd. 2). The Supplement states that it was "entered into" on November 2, 2017. The effective date for minimum starting wage rates was July 1, 2017. Wage increases were set to take effect sometime in October 2017, although no exact date was specified. A separate shift differential was to take effect on January 1, 2018. The Supplement also states any revisions will take place on October 5 of 2015 or any year thereafter. The Supplement does not contain clarifying language as to which of these many dates signify the effective date of the Supplement.

The only specific employment issue discussed in the Supplement is wages. The Supplement also provides:

> 4. Effective on the dates reflected below, Article III [titled Wage Scales] of the CBA shall be revised to reflect the following amounts (and effective dates) in lieu of the rates, adjustments and effective dates referenced in the existing CBA:
>
> . . .
>
> g. The term of the existing CBA will be extended by mutual agreement to reflect the agreed upon expiration date of "October 31, 2022". All references in the CBA will be revised to reflect this agreed upon extension of the expiration date.

(Bd. 2).

On December 26, 2019, the Union filed an RC petition with the Board seeking to represent employees currently represented by Local 101 (Bd. 1(b)). The Employer filed a position statement arguing that the Supplement served as a bar to the RC petition, citing only *Shen-Valley Meat Packers, Inc.*, 261 NLRB 958 (1982).

On January 6, 2020, a hearing was held at the NLRB, Region 13. Local 705 and the Employer were present at the hearing. The Employer was represented by a team of three attorneys. Also present were multiple members of management and multiple employees of the Employer. Local 101 was not present at the hearing nor did Local 101 file a request for extension of the hearing date. The Employer and Union submitted post-hearing briefs; Local 101 did not.

On January 16, 2020, the Regional Director issued a Direction of Election finding that the Employer failed to meet its burden to show that the Supplement triggered a contract bar that would prevent the employees from exercising their right to choose to be or not be represented by a particular Union. The Regional Director reasoned that (1) it was not clear which of the many dates strewn throughout the Supplement was its actual effective date, and (2) there was no evidence that, as mandated by the Supplement, it was ever ratified.

On February 10, 2020, an election was held. Of the uncontested ballots, over 93% (27 employees) voted to join the Union, 0% (0 employees) voted to remain with Local 101, and 7% (2 employees) voted for no union representation. On February 19, 2020, the Region issued a Certification of Representative to Local 705.

At no point did the Employer or Local 101 ever file a motion to reopen the record. At no point did the Employer or Local 101 ever file a motion for a rehearing.

## III. STANDARD OF REVIEW

The Board shall grant a request for review only where a compelling reason exists. NLRB Rules and Regulations, Section 102.67(d). The exhaustive list of reasons in which the Board will grant a request for review are: (1) That a substantial question of law or policy is raised because of the absence of, or a departure from, officially reported Board precedent; (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error

prejudicially affects the rights of a party; (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error; or (4) That there are compelling reasons for reconsideration of an important Board rule or policy. *Id*.

## IV. ARGUMENT

### A. The Employer's and Local 101's requests for review should be denied because they rely on evidence, assertions, and arguments that were not presented to the Regional Director.

The bulk of the Employer's and Local 101's requests for review rely on completely unsubstantiated assertions and fresh evidence and arguments that were never presented to the Union, the Hearing Officer, the Regional Director, or anyone else prior to their requests for review. The NLRB Rules and Regulations are clear that a "request may not raise any issue or allege any facts not timely presented to the Regional Director." Sec. 102.67(e); see *Whelan Security Mid-Atlantic, LLC*, 2019 WL 656264 (N.L.R.B.), fn. 1 (2019); *Langer Transp. Corp.*, 2017 WL 6507198 (N.L.R.B.), fn. 1 (2017); *Starbest Construction*, 2017 WL 6379908 (N.L.R.B.) fn. 1 (2017). The Board frequently dismisses requests for review solely because the appellant presents facts and arguments that it did not offer to the Regional Director. E.g., *Langer Transp. Corp.*, 2017 WL 6507198 (N.L.R.B.), fn. 1. That is precisely what both the Employer and Local 101 did in this instance.

First, in a surprisingly brash disregard for the Board's procedures, both parties attached brand new exhibits to their requests for review that were never entered on the record. The Employer attached an email from the Region and Local 101. The email from the Region specifically states that the Local 101 email is "not part of the record nor [is it] properly before the Region for consideration" (Emp. Req. for Rev. Ex. 1). Nevertheless, the Employer decided to bypass the Region and Board procedures and attempt to force it on to the record regardless.

Similarly, Local 101 attached a document from the alleged drafter of the request itself that it falsely refers to as an affidavit.[1] (Int. Req. for Rev. Ex. 1.) Local 101's dishonest claim that the document attached is an affidavit, despite the document not being notarized or otherwise presented under oath, only exacerbates its blatant and insulting disregard for the Board's procedures. Both appellants' attempt to edit the record that was before the Regional Director is grounds for denial in and of itself.

Second, both the Employer and Local 101 frequently cite to an alleged medical condition that staff members of Local 101 supposedly had at the exact same time that just so happened to be the date the hearing was set (Emp. Req. for Rev. pp. 3-6, 14-15; Int. Req. for Rev. pp. 1, 3.). This is not stated by Local 101 anywhere on the record and it is entirely new evidence presented with its request for review. Although the Employer's attorney fought to mention such medical occurrences at hearing, the Employer's attorney did not enter a notice of appearance on behalf of Local 101 and cannot speak for Local 101 (Tr. 37). Further, Local 101 had the right to file a motion to postpone the hearing and a motion to reopen the record, where it could have placed such an excuse on the record, but it chose not to do so. Instead, Local 101 and the Employer allude to off-the-record conversations with the Region for which no evidence on the record exists. It cannot be corroborated that such conversations ever took place. The Employer states that the Region was fully aware of Local 101's situation when it declined the Employer's motion to postpone (Emp. Req. for Rev. p. 14). It is particularly inappropriate for the Employer to claim it knows what the Region does or does not know without offering a shred of evidence to support its claim. The Employer's attempt to introduce evidence that is based purely on post-hearing hearsay is ludicrous.

[1] An affidavit is "a written or printed declaration or statement of facts . . . confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath." THE LAW DICTIONARY FEAT. BLACK'S LAW DICTIONARY, https://thelawdictionary.org/affidavit (last visited Mar. 10, 2020).

Also, Local 101 continuously attempts to offer new evidence regarding the alleged ratification of the Supplement. Local 101 now states that the Supplement was ratified on October 27, 2017, in the Employer's breakroom (101, p2). Again, this is entirely new evidence that was never offered prior to this request for review and the Union never had the chance to refute such allegations at hearing.

Finally, Local 101 states that it has a small staff and thus was too busy around Christmas time to respond to the Notice of Hearing with a motion to postpone (Int. Req. for Rev. p. 3.) This is just one more example of the appellants' desperate attempt to litter the record with new evidence never before presented to the Region or the Union.

Therefore, the Board's Rules and Regulations and well-established Board precedent mandate that the Employer's and Local 101's requests for review be dismissed because both parties presented facts and evidence that were not previously entered on the record or presented to the Regional Director.

**B. The Employer and Local 101 bear the burden of proof to show that a contract bar exists, not the NLRB Hearing Officer or the Regional Director.**

The burden of proving that a contract bar exists is on the party asserting the doctrine. *Roosevelt Memorial Park*, 187 NLRB 517 (1970); *Bo-Law Lamp Corp.*, 111 NLRB 505, 508 (1955) (must sustain the proof by a preponderance of the evidence). "The single indispensable thread running through the Board's decisions on contract bar is that the documents relied on as manifesting the parties' agreement must clearly set out or refer to the terms of the agreement and must leave no doubt that they amount to an offer and acceptance of those terms through the parties' affixing of their signatures." *Seton Medical Center*, 317 NLRB 87, 87 (1995). Furthermore, to determine if that burden has been met, the Board is "permitted only to examine the terms of the contract as they appear within the four corners of the instrument itself," without resorting to parol

evidence. *Jet-Pak Corp.*, 231 NLRB 552, 553 (1977) (cited in *S. Mountain Healthcare*, 344 NLRB 375, fn. 3 (2005)); see *Cind-R-Lite Co.*, 239 NLRB 1255 (1979).

Here, the Employer alleges that the Union's RC petition is blocked by the Supplement because it serves as a contract bar. Local 101 never alleged anything on the record until its request for review was filed with the Board, and thus waives the right to introduce its arguments via its request. The burden rests with the Employer – and Local 101, if the Board deems it still has a right to present arguments and evidence – to prove by a preponderance of the evidence that the Supplement triggers a contract bar.

Local 101 and the Employer had the opportunity to present its evidence and arguments necessary to meet that burden in its initial position statement, at the Regional hearing on January 6, 2020, and in its post-hearing brief. Local 101 failed to file a position statement, failed to appear at the hearing, failed to file a request to postpone the hearing, and failed to file a post-hearing brief. The Employer attempted to satisfy its burden at the January 6 hearing and in its post-hearing brief. At the hearing, the Employer provided a witness and asked multiple questions of multiple witnesses. The Employer also filed a thorough post-hearing brief. In essence, the Employer had multiple opportunities to present the arguments it thought necessary to show that the Supplement served as a contract bar.

The Region, after hearing and reading the in-depth arguments that the Employer had to offer, ruled that the Employer did not meet its burden of showing that the Supplement served as a contract bar, and thus issued a Direction of Election. Now, via its request for review, the Employer claims that the Regional Director's decision should be overturned in large part because the Employer failed to address issues that the Regional Director deemed necessary for the Employer to meet its burden (Emp. Req for Rev. pp. 1-2, 11-13). The Employer attempts to place blame on

the Region and the hearing officer for its own lack of foresight and presentation of necessary arguments and evidence.

The Employer claims that its due process rights were violated because the issue of ratification and the execution date were not broached by the Union or the hearing officer, and thus it did not have notice of the allegations against it (Emp. Req. for Rev. pp. 2, 11). The Employer cites to *Bennet Industries, Inc.*, 313 NLRB 1363 (1994), which states that a party must have "the opportunity to present evidence and advance arguments concerning relevant issues" (no page cite provided by Employer's brief). However, the Union filed the RC petition and the Employer alleges that the petition is blocked by the contract bar. The allegation is made by the Employer against the Union's petition and the burden is on the Employer to show that a contract bar blocks the Union's petition. It is thus the Employer's responsibility to make whatever argument it deems sufficient to meet its burden. However, the Employer never attempted to provide evidence regarding ratification and *did* provide testimony, albeit unconvincing testimony, regarding the execution date (Tr. 35:23-36:1).

The Employer (and Local 101) blames the hearing officer for not asking specific questions about ratification and the execution date, citing the Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings ("Guide"). However, the very first thing the Guide stresses is that:

> [The Guide] is designed *only to provide procedural and operational guidance* to the Agency's staff and *is not intended to be a compendium of substantive or procedural law*, nor a substitute for knowledge of the law. Similarly, the Guide *does not constitute rulings or directives* of the Board or the General Counsel, and *is not a form of authority binding* on either the Board or General Counsel. . . . [W]hile the Guide can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, *it is the Board's decisional law, not the Guide, that is controlling*.

*Preface* (emphases added).[2] The Guide does not shift the burden of proof from the Employer to the hearing officer simply because the Guide offers examples of questions.

Furthermore, the Employer's contention that the execution date was not addressed at the hearing is incorrect. As elaborated on *infra*, both the Employer and the Union asked questions related to the execution date (Tr. 34:4-13, 35:23-36:1). The Employer's questioning was unable to persuade the Regional Director that the execution date was unambiguous.

In sum, the burden rests with the Employer and Local 101 to show that there was a contract bar in place. Both parties had every opportunity to do so, and only the Employer took advantage of that opportunity. Despite its rigorous attempts, it failed to put forth the evidence and arguments necessary to convince the Regional Director that a contract bar was in place. Its attempt to shift the burden to the Union and the Region are misguided and the Employer could not cite a case where such burden shifting was applied. Therefore, the Employer's failure to meet its burden is the Employer's failure alone.

### C. The Regional Director's finding that the Supplement's execution date is ambiguous was correct and not erroneous.

To serve as a contract bar, an agreement must have an unambiguous effective date and expiration date. *S. Mountain Healthcare & Rehabilitation Ctr.*, 344 NLRB 375, 376 (2005). "Unless these dates are apparent from the face of the contract, without resort to parol evidence, the contract will not serve as a bar. The terms of the agreement must be clear from its face so that employees and outside unions may look to it to determine the appropriate time to file a representation petition." *Id.* (citing *Cind-R-Lite Co.*, 239 NLRB 1255, 1256 (1979)); *Cooper Tire & Rubber Co.*, 181 NLRB 509 (1970). The Regional Director correctly found that the Supplement did not contain a clear and unambiguous execution date. The Regional Director's reliance on the

[2] No page number is listed for the Preface.

fact that there are multiple dates strewn throughout the Supplement is clearly not erroneous and should not serve to overturn his decision.

In *S. Mountain Healthcare*, an agreement contained multiple potential execution dates without specifically stating that any such date was the date of execution. 344 NLRB at 375. Two of those potential dates were March 5, 2004, when the union signed the agreement, and March 9, 2004, when the employer signed the agreement. *Id.* Based on testimony adduced at hearing, the Regional Director in that case held that March 5 was the intended execution date. *Id.* at fn. 3. The Board overturned the Regional Director, holding that (1) the Regional Director erred by considering testimony at hearing because the date of execution must be unambiguous on the face of the document, and (2) the date of execution was too ambiguous for a third party to deduce the date of execution from the agreement alone. *Id.* at 375.

This case is analogous to *S. Mountain Healthcare*. The Supplement does not contain an unambiguous date of execution on the face of the document. There are a vast array of potential dates of execution: July 1, 2017, when the Supplement modified the minimum starting wage; some unspecified date in October (the Supplement only states "Oct. 2017"), when certain wage increases took effect; November 2, 2017, when the agreement states it was "entered into;" November 6, 2017, when it was signed by the Employer; November 7, 2017, when it was signed by Local 101; January 1, 2018, when third-shift differential went into effect; or essentially any other date, since ratification is a condition to execution and no date of ratification is outlined in the Supplement. It is impossible for the Union or any other third party to deduce when the Supplement was executed based on the Supplement alone, particularly because certain wage increases were triggered months before the "entered into" date and the date of the signatures.

Even the Employer is confused as to the Supplement's date of execution. At the January 6 hearing, David Aldridge ("Aldridge"), Vice President of Human Resources for the Employer, testified that the Supplement's date of execution was November 7, 2017:

> Q (Union Counsel): The original collective bargaining agreement dated 2015-2020, that was executed on October 30, 2015, correct?
> A (Aldridge): Yes.
> Q: And then the extension was executed on November 7, 2017, or was it November 6, 2017?
> A: I executed my copy on November 6, '17, is what is stated here.
> Q: But was the agreement itself executed when you signed it or when both parties signed it?
> A: I assume that [wh]en both parties signed it.

(Tr. 33:25-34:11). Aldridge later stated that the Supplement was "entered into" on November 2, 2017 (Tr. 35:23-36:1), evidencing his belief that the "entered into" date was not the date of execution. Despite Aldridge's sworn testimony that the date of execution was November 7, 2017, when both parties signed the Supplement, the Employer argues throughout its brief that the actual date of execution was November 2, 2017. The Employer's inability to be consistent as to when it believes the Supplement was executed shows that the execution date is more than ambiguous just to a third party; it is downright confusing for even the party that signed it.

Local 101 also seems confused about the execution date in its request for review: "As for the effective date of this [Supplement], like any other Agreement we reach, as soon as it was put down on paper and dated. That was the date it went into effect." (Int. Req. for Rev. p. 2.) Local 101 argues here that the Supplement went into effect when it was "put down on paper" and dated, but it did not sign and date the document until November 6, 2017. Elsewhere in its request for review, Local 101 argues the effective date was November 2, 2017 (Int. Req. for Rev. p. 2).

Furthermore, the ambiguity of the execution date is evidenced by the Employer's and Local 101's belief that its testimony and newly introduced evidence – attached to their requests for review – are necessary to clarify the date of execution. The Employer states that Local 101 "could

have provided appropriate evidence to establish that the Supplement[] was ratified and that it commenced on November 2, 2017" (Emp. Req. for Rev. p. 11). In its attempt to provide such evidence, it attaches an email from Local 101 to the Region that it finds necessary to grasp when the Supplement was executed. Similarly, Local 101 stated that it would have presented evidence at hearing to make its argument of when it believes the Supplement's date of execution was. (Int. Req. for Rev. p. 2). Local 101 also found it necessary to provide an unauthenticated "affidavit" to help clear up confusion as to when the Supplement was executed (Int. Req. for Rev. Ex. 1). If the date of execution was unambiguous, additional testimony and evidence would not be necessary.

Finally, the Employer's and Local 101's argument that they were prejudiced because the issue was not raised by the Union or hearing officer is without merit. As explained *supra*, the burden rests with the Employer and Local 101 to prove a contract bar exists. Its knowledge of the importance of the execution date – assuming *arguendo* that they did not know that was an important issue in discerning if a contract bar exists – is a moot point because the document itself must display an unambiguous date of execution. Even if the argument was presented in more detail by the Union or hearing officer, the Employer's and Local 101's testimony and argument would be irrelevant because the date must be discerned from the document itself *without* assistance from the parties to the Supplement. Both the Union and the Regional Director were unable to discern the date of execution from the document itself. It does not matter if further testimony would have clarified the date. Ironically, had Local 101 testified that the date of execution was November 2, 2017, it would have directly contradicted the Employer's testimony that the date of execution was November 7, 2017, thus solidifying that the execution date is completely ambiguous.

Therefore, the Regional Director's finding that the numerous dates made the Supplement's execution date unclear is factually correct and clearly not erroneous.

**D. The Supplement was never ratified, as required by the Supplement itself, and the Regional Director correctly found there is no evidence suggesting otherwise.**

The Board has consistently held that "where ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition. . . ." *Appalachian Shale Products Co.*, 121 NLRB 1160, 1163 (1958), cited in *Merico, Inc.*, 207 NLRB 101, fn. 2 (1973). Parol evidence on this issue is irrelevant. *United Health Care Services*, 326 NLRB 1379 (1998); *Gate City Optical Co.*, 175 NLRB 1059, 1061 (1969). It is also irrelevant whether the parties have implemented the terms of the agreement that purports to trigger the contract bar. *Waste Mgmt. of Maryland, Inc.*, 338 NLRB 1002, 1003 (2003) (citing *Branch Cheese*, 307 NLRB 239 (1992). The Regional Director correctly found that the Supplement mandated ratification and that the record is devoid of any evidence showing that the Supplement was ratified. Such finding was clearly not erroneous.

The Supplement clearly states that it is not executed until it is ratified: "The Parties agree that this Supplemental Agreement is not effective and binding on either Party (or the Union Member) until and unless the terms are ratified and approved by authorized representatives of the Union, authorized representatives of the Union Members and the Company." (Bd. 2.) The Supplement contains no addendum or attachment showing that the Supplement was ratified. There is no admissible evidence on the record that states or even suggests that the Supplement was ever ratified. The Employer and Local 101 did not provide any evidence to the Regional Director to show that the Supplement was ratified, as mandated by the document itself.

The Employer and Local 101 argue that had they known ratification was an issue, they would have presented evidence at hearing (Emp. Req. for Rev. p. 11; Int. Req. for Rev. p. 7). As with the issue of the execution date, the burden rests on the Employer and Local 101 to show that the Supplement was ratified. The Regional Director correctly found that they did not meet that

burden. The appellants argue that ratification is implied because the terms of the agreement were implemented (Emp. Req. for Rev. pp. 2, 9-10; Int. Req. for Rev. p. 2), but the Board has specifically held that implementation does not confirm ratification, *Waste Mgmt. of Maryland, Inc.*, 338 NLRB at 1003.

Also, even if they had read the Supplement and noticed that they must provide proof of ratification, they would not be able to prove ratification through parol evidence. A third party must be capable of determining if ratification occurred and when from the document itself. The Employer admits that it is impossible for a third party to determine that the Supplement was ratified: "[T]he only party who could put forth evidence of ratification fo the Supplement[] was absent," which was Local 101 (Emp. Req. for Rev. p. 13).

Finally, the Employer argues that it was prejudiced by Local 101 choosing not to show up at the hearing because Local 101 was the "only party who could put forth evidence of ratification."*Id.* However, assuming *arguendo* that parol evidence would be allowed to prove ratification, the Employer could have called any number of employees to testify that the Supplement was ratified, including the employees that were present the day of the hearing. Similarly, Local 101 would have attempted to provide an "affidavit" from an employee stating that the Supplement was ratified, such as the affidavit it provided from Local 101's staff. The fact that neither the Employer nor Local 101 made any attempt to put an employee's statement on the record, either before or after the hearing, strongly suggests that the Supplement was never ratified at all.

Therefore, the Regional Director's finding that the Supplement could not serve as a contract bar because there was no evidence of ratification as mandated by the Supplement itself is correct and clearly not erroneous.

**E. Local 101 and the Employer were not unfairly prejudiced nor were their due process rights violated.**

Local 101 and the Employer claim that they were both prejudiced by Local 101's absence from the January 6 hearing (Emp. Req. for Rev. pp. 11-13; Int. Req. for Rev. pp. 1-5). This is patently untrue. Local 101 had every opportunity to have its opinion heard on this matter, and until this request for review, failed to do so. Local 101 failed to file a position statement prior to the hearing. Local 101 had the right to file a motion to postpone the hearing if it was unable to attend, and it chose not to do so. The Employer also did not mention Local 101 in its motion to postpone. The Employer and Local 101 state that all of Local 101's staff happened to be sick the day of the hearing, but the record is void of Local 101 ever stating such, and even if true, is a moot point because Local 101 still failed to file the necessary motion to postpone. Local 101 also never filed a post-hearing brief. Local 101 and the Employer then had a right to file a motion to reopen the record, yet both parties chose not to do so. The Board's rules and regulations provided Local 101 with multiple opportunities to present its arguments, and time and again it failed or chose not to do so.

Even if Local 101 appeared at the January 6 hearing, it would not have had an impact on the Regional Director's decision. As the Regional Director correctly emphasized, the contract bar must be proven by utilizing the Supplement itself, not parol evidence such as hearing testimony. No matter what evidence Local 101 provided, it does not change the text of the Supplement, which is all that third parties, such as the Union, have to rely on to determine if a contract bar is in place.

Assuming *arguendo* that Local 101's testimony regarding ratification would be permissible, Local 101's absence from the hearing did not prevent the Employer from entering evidence concerning the ratification. The Employer could have called employees or members of management to testify that the Supplement was ratified but failed or chose not to do so. The

Employer *did* respond to questions clarifying that it believes the date of execution was September 7, 2017, as discussed *supra*, even without Local 101 present.

Therefore, neither the Employer nor Local 101 were prejudiced by Local 101's decision to not attend the January 6 hearing.

**F. The Regional Director departed from long-established Board precedent by holding that the Supplement constituted more than a wage reopener.**

A substantial question of law and policy is raised here because the Regional Director departed from long-established Board precedent. Even if the Board finds reason to grant the appellants' request for review on other grounds, the Board should still find that the Supplement does not constitute a contract bar. An amendment or extension to a contract may reactivate the contract bar after the initial three-year period if it "expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period." *Southwestern Portland Cement Co.*, 126 NLRB 931, 933 (1960). To expressly reaffirm a prior contract and thus reactivate the contract bar, an amendment must not be limited to a single, insular issue, such as wages. *Shen-Valley Meat Packers, Inc.*, 261 N.L.R.B. 958, 959-960 (1982).

The Board has made it clear that wage reopeners do not reactivate the contract bar. In *Shen-Valley*, the parties executed a five-year contract to last from 1978 to 1983. *Id.* at 958. The contract allowed for a reopener after two years to negotiate "wage rates and other conditions" and a wage reopener every six months. *Id.* The parties reopened the wages multiple times. *Id.* In February 1981, the parties exercised their two-year reopener clause to renegotiate a litany of working conditions, including recognition, hours, holidays, disability pay, supervisory employees, and vacations. *Id.* A separate union filed an RC petition in 1982 and the parties to the contract asserted the contract bar based on the February 1981 amendment. *Id.*

The Board held that the February 1981 amendment served as a bar to the RC petition. The Board found that the amendment expressly reaffirmed the original agreement because it covered a "broad range of significant terms and conditions of employment." *Id.* at 959. The amendment referred specifically to multiple sections of the original agreement that it purported to change, showing that the parties were expressly reaffirming their original agreement. *Id.* The Board specifically contrasted the February 1981 amendment with the multiple other reopeners that only addressed wages, which would not reactivate the contract bar: "[T]he February [1981] amendment covers a broad range of significant terms and conditions of employment. The other amendments, in contrast, were narrowly limited in scope by the terms of the original contract; they were essentially wage reopeners." *Id.*

In our case, the Supplement between the parties addresses only one issue: wages. There is not a single specific reference to any other term and condition of employment. There is no indication that bargaining took place over anything other than wages. The grievance that is referenced throughout the Supplement is specifically referred to as the "Wage Grievance" (Bd. 2). Aldridge testified that only two things led to the Supplement: wage compression and a signing bonus (Tr. 25:3-5, 25:21-26:8). He attempted to paint a picture of in-depth bargaining between the parties, but even in his long-winded testimony, everything he referenced constituted wages, whether it be in the form of shift differential or starting wages (Tr. 26:13-27:25). The Employer could not name a single issue that was discussed other than wages. The Supplement was and only served to be a wage reopener.

The Employer may argue that the Supplement's language in Section 4, part "g," transforms the Supplement into something more substantive than a wage reopener. However, there is no indication that any bargaining took place over issues other than wages. The Employer

acknowledged that it did not believe anything other than wages was to be negotiated with the Supplement (Tr. 26:13-27:25). Aldridge was specifically asked, "What was your understanding of what was to be negotiated under a supplemental agreement?" (Tr. 26:13-14.) His response only mentions issues that constitute wages (Tr. 26:13-27:25). Therefore, based on the Supplement and Aldridge's testimony, it is clear that the parties did not negotiate anything other than wages.

Therefore, the Supplement is only a wage reopener and does not expressly reaffirm the parties' commitment to the CBA as held by long-established Board precedent.

## V. CONCLUSION

Because the Employer and Local 101 failed to meet their burden to show that the Supplement serves as a contract bar to an RC petition, the Regional Director's decision was appropriate and correct. Furthermore, the Employer's and Local 101's requests for review inappropriately attempt to offer and rely largely on new evidence. As such, the Union respectfully requests that the Board deny the Employer's and Local 101's ill-conceived requests for review.

Respectfully submitted,

s/ Alex M. Tillett-Saks

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## CERTIFICATE OF SERVICE

Pursuant to the Board's Rules and Regulations §§ 102.67(f) and (i)(2), the undersigned hereby certifies that its Brief in Opposition to the Petitioner's and Employer's requests for review was filed electronically with the Office of the Executive Secretary on March 11, 2020. A copy was also submitted to the following individuals via regular U.S. mail and/or email on March 11, 2020.

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